

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

SECURE TECHNOLOGIES INTERNATIONAL,)	
)	
Plaintiff,)	CIVIL ACTION
v.)	
)	No. 04-2121-KHV
BLOCK SPAM NOW, L.L.C., RAYMOND C.)	
ALEXANDER. ROBERT C. WILSON, AEO)	
PUBLISHING, MICHAEL T. GLASPIE, TOTAL)	
MARKETING LIVE and ROBERT TEDDERS,)	
)	
Defendants.)	
)	

ORDER

This matter is before the Court on plaintiff's Motion For Default Judgment [Against Robert C. Wilson] (Doc. #2) filed June 18, 2004; the Motion Of Defendant Robert C. Wilson To File Answer And Counterclaim Out Of Time, Opposition To Plaintiff's Motion For Default Judgment And Memorandum In Support (Doc. #5) filed July 2, 2004; and the Motion To Dismiss Robert Tedders For Lack Of Personal Jurisdiction (Doc. #18) filed July 29, 2004.

Factual Background

Plaintiff filed this action on March 25, 2004. Shortly thereafter, plaintiff's counsel mailed a copy of the complaint and a request for waiver of service of summons to Robert C. Wilson and Raymond C. Alexander. Counsel did not send any waiver of service forms for them to complete. Michael T. Glaspie did not receive any mailing from plaintiff's counsel.

Shortly before April 19, 2004, Wilson, Alexander and Glaspie contacted Tamatane Aga, Jr.

regarding this lawsuit.¹ On April 19, 2004, Wilson, Alexander and Glaspie agreed to sign waiver of service forms, but they told Aga that they had not received the forms at that time. On April 19, 2004, Aga called plaintiff's counsel and told him that although Wilson and the other defendants would likely retain different counsel, he was calling on their behalf for the limited purpose of obtaining waiver of service forms. By e-mail, that same day, plaintiff's counsel sent Aga the waiver of service forms. Aga forwarded the forms to Wilson and the other defendants.

On April 20, 2004, Wilson signed the waiver of service form and returned it to plaintiff's counsel. The waiver of service form indicated that under Rule 12, Fed. R. Civ. P., Wilson had 60 days after March 25, 2004 to file an answer or a motion. That same day, Wilson sent a signed copy of the form to Aga – who did not know that Wilson had sent the original to plaintiff's counsel. Aga kept the signed waiver from Wilson and waited for Alexander and Glaspie to return their waiver forms.

On June 17, 2004, during a meeting with Wilson and Alexander, Aga learned that Wilson had mailed a signed waiver of service form directly to plaintiff's counsel on April 20, 2004. On June 17, 2004, Aga left a message for plaintiff's counsel informing him that he represented the defendants, but that Wilson would need additional time to respond to the complaint. The next day, on June 18, 2004, plaintiff filed a motion for default judgment against Wilson. On June 21, 2004, Aga again called plaintiff's counsel, who informed Aga that Wilson was already in default. That same day, Aga received a copy of plaintiff's motion for default judgment.

¹ Aga had previously represented Wilson, Alexander, Glaspie, Block Spam Now and AEO Publishing in a dispute with plaintiff and its president, George Hellis.

Analysis

I. Motion To File Out Of Time By Robert Wilson (Doc. #5)

Under Rule 12, Fed. R. Civ. P., Wilson had until May 24, 2004 (60 days after March 25, 2004) to file an answer or a motion. Wilson did not file a motion for extension of time, however, until July 2, 2004 – more than a month later. Ordinarily, when a party does not seek an extension of time before a specified deadline, the Court will not grant an extension absent “excusable neglect.” D. Kan. Rule 6.1(a). Although Rule 6.1(a) does not define “excusable neglect,” whether neglect is excusable depends on the facts of each case and the question is determined on the basis of the common-sense meaning of the two simple words applied to the facts which are developed. Buckley v. United States, 382 F.2d 611, 614 (10th Cir. 1967), cert. denied, 390 U.S. 997 (1968).

Cases which construe the concept of excusable neglect in other contexts inform the Court’s analysis of the issue in this case. The Supreme Court analyzed the excusable neglect standard in Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P., 507 U.S. 380 (1993).² “[E]xcusable neglect is a somewhat elastic concept and is not limited strictly to omissions caused by circumstances beyond the control of the movant.” Pioneer, 507 U.S. at 392. On the other hand, “inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute ‘excusable’ neglect.” Id.

In determining whether the excusable neglect standard is met, courts should consider all relevant circumstances, including (1) the danger of prejudice to the nonmoving party, (2) the length of the delay and

² Although the Pioneer analysis was in the context of Fed. Bankr. R. 9006(b)(1), the Tenth Circuit has adopted it in other contexts as well. See City of Chanute, Kan. v. Williams Nat’l Gas Co., 31 F.3d 1041, 1046 (10th Cir. 1994).

its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. Id. at 395. Control over the circumstances of the delay is “a very important factor-perhaps the most important single factor-in determining whether neglect is excusable.” City of Chanute, 31 F.3d at 1046.

Wilson asserts that he responded out of time because his attorney mistakenly assumed that he did not send the original waiver of service form to plaintiff’s counsel on April 20, 2004. Wilson’s attorney, who also represents co-defendants Block Spam Now, Alexander, Wilson, AEO Publishing and Glaspie, received a copy of Wilson’s waiver of service form but decided to do nothing until he received the waiver of service forms from Wilson’s co-defendants. Considering the factors listed above, the Court finds that the delay was entirely within the control of defendant’s counsel, who could have timely requested an extension of time. Absent mitigating circumstances, attorney inadvertence, ignorance of rules or mistakes construing rules do not constitute excusable neglect. See Pioneer, 507 U.S. at 395-97; CSU, L.L.C. v. Xerox Corp., 202 F.R.D. 275, 282 (D. Kan. 2001). Defendant has not made a strong showing of mitigating circumstances, but the other three factors weigh strongly in favor of defendant. Defendant’s delay has caused no prejudice to plaintiff and no material delay of the proceedings. In particular, Wilson and his co-defendants (who are not in default) share common defenses and counterclaims against plaintiff. Likewise, the Court has no reason to believe that defendant or his attorney acted in bad faith. After balancing the above factors, the Court grants Wilson leave to file his answer and counterclaims.

II. Plaintiff’s Motion For Default Judgment (Doc. #5)

Because the Court sustains Wilson’s motion to file an answer out of time, the Court overrules as

moot plaintiff's motion for default judgment.³ In the alternative, plaintiff seeks costs and fees which it incurred in filing its motion for default judgment and responding to Wilson's motion to file an answer out of time. Plaintiff cites no authority for its request.

In any event, the Court declines to award fees and costs. On June 17, 2004, defense counsel left a message for plaintiff's counsel, informing him that he represented defendants but that Wilson would need additional time to respond to the complaint. The next day, instead of returning defense counsel's call, plaintiff's counsel filed a motion for default judgment against Wilson. Plaintiff's motion for default judgment was unnecessary and it did not require the expenditure of more than *de minimis* attorney time. For these reasons, the Court overrules plaintiff's motion for default judgment.

III. Motion To Dismiss Of Robert Tedders (Doc. #18)

Pursuant to D. Kan. Rule 6.1(d)(2) and Fed. R. Civ. P. 6(a), plaintiff had until August 23, 2004 to file a response to defendant's motion to dismiss for lack of personal jurisdiction. To date, plaintiff has not responded to defendant's motion. Pursuant to D. Kan. Rule 7.4, "[i]f a respondent fails to file a response within the time required by Rule 6.1(d), the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice." For this reason and those set

³ Even if default against Wilson was appropriate, the Court would delay any judgment against him based on the pending related claims against his co-defendants. The Tenth Circuit has held that "consistent damage awards on the same claim are essential among joint and several tortfeasors." Hunt v. Inter Globe Energy, Inc., 770 F.2d 145, 148 (10th Cir. 1985). "[I]f at trial facts are proved that exonerate certain defendants and that as a matter of logic preclude the liability of another defendant, the plaintiff should be collaterally estopped from obtaining a judgment against the latter defendant, even though it failed to participate in the proceeding in which the exculpatory facts were proved." Farzetta v. Turner & Newall, Ltd., 797 F.2d 151, 154 (3d Cir. 1986); see Haines v. Fisher, 82 F.3d 1503, 1511 (10th Cir. 1996); Gulf Coast Fans, Inc. v. Midwest Elecs. Importers, Inc., 740 F.2d 1499, 1512 (11th Cir. 1984).

forth in the Brief In Support Of Motion To Dismiss Robert Tedders For Lack Of Personal Jurisdiction (Doc. #19) filed July 29, 2004, the Court sustains defendant's motion.

IT IS THEREFORE ORDERED that plaintiff's Motion For Default Judgment [Against Robert C. Wilson] (Doc. #2) filed June 18, 2004 be and hereby is **OVERRULED as moot**.

IT IS FURTHER ORDERED that the Motion Of Defendant Robert C. Wilson To File Answer And Counterclaim Out Of Time, Opposition To Plaintiff's Motion For Default Judgment And Memorandum In Support (Doc. #5) filed July 2, 2004 be and hereby is **SUSTAINED**.

IT IS FURTHER ORDERED that the Motion To Dismiss Robert Tedders For Lack Of Personal Jurisdiction (Doc. #18) filed July 29, 2004 be and hereby is **SUSTAINED**.

Dated this 7th day of September, 2004 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge